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Mailed: March 31, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Worldwide Golf Enterprises, Inc.
v.
Pintracker Golf, Inc.

Opposition No. 91110983

Marsha G. Gentner of Jacobson Holman, PLLC for Worldwide Golf Enterprises, Inc.

Gregory B. Beggs of Law Offices of Gregory B. Beggs for Pintracker Golf, Inc.

Before Chapman, Holtzman and Rogers, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Pintracker Golf, Inc.,¹ has filed an application to register the mark PINTRACKER on the Principal Register for

¹ The Board has been notified that applicant is involved in a bankruptcy proceeding under Chapter 7 of the Bankruptcy Act. Because the automatic stay provisions of 11 U.S.C. §362 apply, proceedings in the opposition would normally be suspended pending termination of the bankruptcy action. However, in correspondence dated March 11, 2005, the representative for applicant's trustee in bankruptcy requested that the Board proceed with the issuance of a final decision in this case, advising that the trustee is authorized under Federal Rule of Bankruptcy Procedure 6009 to defend the opposition and that the trustee formally elects to do so. Accordingly, in reliance on the trustee's

"golf clubs."²

On June 10, 1998, Worldwide Golf Enterprises, Inc. (opposer) filed an opposition to registration of the above application. As grounds for opposition, opposer alleges that applicant's mark so resembles opposer's previously used and registered "PINSEEKER" and "PIN" marks, identified below, for golf equipment and clothing as to be likely, when applied to applicant's goods, to cause confusion or mistake or to deceive. Opposer further alleges that applicant was aware of opposer's PINSEEKER mark and registration thereof prior to adopting the PINTRACKER mark. Opposer identified its registrations as follows: Registration No. 970098 for PINSEEKER and flag design, issued October 9, 1972; Registration No. 1163910 for PIN-LITE issued August 4, 1981; Registration No. 1175348 for PINSEEKER GOLF CORPORATION and flag design, issued October 27, 1981; Registration No. 1497862 for PINSEEKER and flag design, issued July 26, 1988; Registration No. 1561049 for PINSEEKER and flag design, issued October 17, 1989; and Registration No. 1596622 for PINPOINTER, issued May 15, 1990.

Applicant, in its answer, admitted that the registrations listed by opposer in the opposition issued on the dates alleged and that applicant was aware that PINSEEKER and design had been

authority under Federal Rule of Bankruptcy Procedure 6009, proceedings in this case will go forward.

² Application Serial No. 74600374 filed on November 18, 1994, based on dates of first use on September 20, 1994 and first use in commerce on October 1, 1994.

registered prior to adoption of its PINTRACKER mark. Applicant denied the remaining salient allegations. In addition, applicant affirmatively asserted that opposer is "estopped" from challenging its mark "at this late date."

The record includes the pleadings, the file of the involved application, and opposer's notice of reliance on status and title copies of five of the six registrations pleaded in the opposition.

Both opposer and applicant filed briefs. An oral hearing was not requested.

Before proceeding to the merits, an evidentiary matter needs to be addressed. On February 1, 2002, applicant filed, along with its brief on the case, a motion to accept its notice of reliance on eleven third-party registrations. Opposer has objected to the motion.

As background for this matter, the initial trial order issued by the Board set discovery to close on May 21, 1999 and opposer's testimony period to open on July 18, 1999. On July 8, 1999 opposer filed a motion to compel and a motion to reset its testimony period to open sixty days from receipt of applicant's responses to the subject discovery requests.

The Board, on August 23, 2000, granted the motion to compel, allowing applicant until September 12, 2000 to respond to opposer's interrogatories. In addition, the Board granted the

motion to reset trial dates to the extent that opposer's testimony period was reset to open on September 1, 2000.

On August 31, 2000 opposer filed a motion for reconsideration of that portion of the order resetting opposer's testimony period to open almost two weeks before the discovery responses were due, requesting that its testimony period be reset to open on October 26, 2000. This motion was followed, on September 22, 2000, by opposer's motion for sanctions in the nature of default judgment in view of applicant's complete failure to comply with the Board's August 23, 2000 order. Applicant responded to the motion stating that it served the discovery responses on September 27, 2000, and further stating that it did not object to opposer's motion for an extension of trial dates. Opposer, in reply, maintained its motion for sanctions and requested that the Board reset its testimony period to close on November 10, 2000.

Before these motions were decided, opposer, on October 26, 2000, filed its notice of reliance.

Then on March 16, 2001, opposer filed a "motion for clarification, or in the alternative, extension of time." By this motion, opposer, noting that proceedings had not yet been suspended pending disposition of its motion for sanctions, requested a sixty-day extension of time from the Board's ruling on the motion to file its brief on the case "or, if the Board

resets Opposer's testimony period, whenever appropriate under such reset schedule."

Applicant noted opposer's request for an extension of time to file its trial brief, but in response thereto, stated only that "[t]o whatever extent the present motion is calculated to revive Opposer's opportunities to pursue its case despite its inactivity, applicant respectfully asks the Board to reject those suggestions."

The Board subsequently suspended proceedings on August 7, 2001, and on October 29, 2001, issued an order on the pending motions.

By this order, the Board denied opposer's motion for sanctions; and noting opposer's notice of reliance filed on October 26, 2000, stated, "It appears from a review of this file that the parties have proceeded to trial and have submitted some evidence." The Board accordingly granted opposer's August 31, 2000 motion for reconsideration to the extent that the notice of reliance was accepted as timely, and granted opposer's March 16, 2001 motion for a sixty-day extension of time to file its trial brief.

Opposer timely filed its trial brief on December 28, 2001. Applicant, in turn, timely filed its trial brief by a certificate of mailing dated January 28, 2002. On that same date, applicant

filed its motion that the Board accept the proffer of its notice of reliance on the third-party registrations.

In support of its motion, applicant argues that it had pleaded the existence of the third-party registrations in its answer to the notice of opposition; that applicant never had any testimony period following the "final closure" of opposer's testimony period in which to submit its own notice of reliance; and that while the Board in its October 29, 2001 order "expressly refused" to reset opposer's testimony period, the Board also did not reset any testimony period for applicant, and instead only reset dates for trial briefs. Applicant maintains that opposer's testimony period "was kept alive" by requests for extensions, by motions and by suspension orders until October 29, 2001; and that in view of the acceptance of opposer's notice of reliance just before the trial briefs, the Board should accept the applicant's proffer of its own notice of reliance at this time. Replying to opposer's objection to the motion, applicant states that it is specifically not seeking to reopen testimony, but only leave to file its notice of reliance "instanter."

Applicant's attempt to introduce this evidence during the briefing stage of the case is untimely and improper. See Trademark Rule 2.122(e). See also *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782 (TTAB 2001) and *Plantronics Inc. v. Starcom Inc.*, 213 USPQ 699 (TTAB 1982). If applicant

believed that the Board by its October 29, 2001 order incorrectly reset dates, it was incumbent upon applicant to file a proper and timely request for reconsideration of that order within the one month time period specified by Trademark Rule 2.127(b).

Moreover, we note that there was nothing in applicant's response to opposer's March 16, 2001 motion to indicate to the Board that applicant objected to opposer's request to reset only briefing dates and not trial dates, or to even suggest that a resetting only of briefing dates was not fully acceptable to applicant.

Thus, based on opposer's request to reset only briefing dates, to which no objection was made, and given that evidence had in fact already been filed in this case, the Board reasonably concluded that the parties did not require additional time for trial.

Applicant waited for three months after the decision, without any explanation for the delay, to, in effect, make its objection known.

Because applicant did not file a timely request for reconsideration and has not shown excusable neglect to reopen its testimony period,³ applicant's motion to accept its notice of

³ Although applicant states in its reply brief on the motion that it is specifically not seeking to reopen its testimony period, the simple fact is that if we were to "accept" applicant's notice of reliance, opposer would be entitled to a rebuttal testimony period in which to introduce evidence to refute or explain applicant's evidence followed by briefing dates to present arguments relating to the evidence. In any event, applicant has offered no reason, let alone an excusable reason, for its three-month delay in seeking, in effect, to reopen its testimony period.

reliance at this late date is denied. Accordingly, neither the third-party registrations nor any arguments relating to those registrations will be considered.⁴

We turn then to the merits of this case.⁵ Opposer has made of record status and title copies of five of its six pleaded registrations, prepared by the Office on September 8, 2000, all showing on their face their current status and ownership in opposer. However, USPTO records currently show that two of those registrations, Registration Nos. 970098 and 1175348, were not renewed and have been cancelled by the USPTO.⁶ Expired or cancelled registrations are not evidence of anything except that they issued and we accordingly have given them no other evidentiary effect. See TBMP 704.03(b)(1)(A) (2d ed. rev. 2004) and cases cited therein.

⁴ Even if we were to consider this evidence on the merits, as discussed *infra*, it would not affect the outcome of this case or any aspect of our decision.

⁵ Although applicant affirmatively asserted an "estoppel" defense in its answer, inasmuch as applicant submitted no evidence on the defense or argument beyond a mere passing reference, the defense will be given no further consideration.

⁶ Office records show that Registration No. 970098 was cancelled on July 10, 2004 and Registration No. 1175348 was cancelled on August 3, 2002. When a Federal registration owned by a party has been properly made of record, and the status of the registration changes between the time it was made of record and the time the case is decided, the Board, in deciding the case, will take judicial notice of, and rely on, the current status of the registration, as shown by the records of the Office. See TBMP §704.03(b)(1)(A) (2d ed. rev. 2004).

Nevertheless, on the basis of the three registrations which are valid and of record, opposer's standing has been established, and its priority with respect to the registered marks for the goods identified therein is not in issue. King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Those three registrations are as follows:

Registration No. 1561049 for the following mark for "clothing for men - namely, sweaters, vests, shirts, slacks, shorts, and gloves; clothing for women - namely, skirts, shorts, slacks, blouses, and gloves; caps, visors, hats, socks, and rainwear":⁷



Registration No. 1497862 for the following mark for "golf clubs, golf balls, golf bags, golf bag covers and golf club wood head covers":⁸



Registration No. 1163910 for the following mark for "golf clubs":⁹

PIN-LITE

⁷ Issued October 17, 1989; affidavits under Sections 8 and 15 accepted and acknowledged, respectively.

⁸ Issued July 26, 1988; affidavits under Sections 8 and 15 accepted and acknowledged, respectively.

⁹ Issued August 4, 1981; renewed.

Contrary to applicant's contention, these registrations constitute prima facie evidence of opposer's ownership of the marks shown, the validity of each registration, opposer's exclusive right to use the marks in connection with the identified goods, and moreover opposer's use of the marks for the goods specified in therein at least as early as the filing dates of the applications that issued into those registrations. See Section 7(b) of the Trademark Act; *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435 (CCPA 1965); *American Throwing Company, Inc. v. Famous Bathrobe Company, Inc.*, 250 F.2d 377, 116 USPQ 156 (CCPA 1957); and *Liberty & Co., Ltd. v. Liberty Trouser Co., Inc.*, 216 USPQ 65 (TTAB 1982). Because applicant did not file a counterclaim to cancel of any of these registrations, applicant's challenge to the ownership and validity of the registrations will not be considered.¹⁰ See Trademark Rule 2.106(b)(2)(ii). See also *The Gillette Company v. "42" Products Ltd., Inc.*, 158 USPQ 101 (CCPA 1968); and *Contour Chair-Lounge Co., Inc. v. The Englander Company*, 139 USPQ 285 (CCPA 1963).

We turn next to the question of likelihood of confusion. Our determination under Section 2(d) is based on an analysis of

¹⁰ To the extent that applicant seeks dismissal of the opposition under Trademark Rule 2.132(b), the motion is denied as untimely. See Trademark Rule 2.132(c). In any event, a finding of likelihood of confusion may well be based solely on a consideration of the marks and goods as shown in the respective application and registrations.

all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue, including the similarity of the marks and the similarity of the goods.¹¹ In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

In our analysis we will focus on the closest of opposer's registrations to the involved application, Registration No. 1497862 of the mark PINSEEKER and design for "golf clubs, golf balls, golf bags, golf bag covers and golf club wood head covers."

The goods identified in Registration No. 1497862 include golf clubs. These goods are identical to the goods covered by the application. Because these goods are identical and there are no restrictions as to their channels of trade or classes of purchasers, they must be deemed to be sold in the same channels of trade and directed to the same purchasers. Interstate Brands Corp. v. McKee Foods Corp., 53 USPQ2d 1910 (TTAB 2000). It is clear that if these identical goods are offered under similar marks there would be a likelihood of confusion.

¹¹ Contrary to applicant's contention, any determination by the examining attorney regarding the likelihood of confusion between these marks is irrelevant to our determination herein. The Board is not bound by determinations made at the examination level. See Hilson Research Inc. v. Society For Human Resource Management, 27 USPQ2d 1423 (TTAB 1993).

Thus, we turn to the marks, keeping in mind that when marks would appear on identical goods, the degree of similarity between the marks necessary to support a finding of likely confusion declines. *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant argues that PINTRACKER and PINSEEKER do not look alike or sound alike, and that the design in opposer's registration separates the term PIN from the term SEEKER thereby emphasizing the separation of the words and the golf pin flag. Applicant points out that opposer has admitted that "PIN" is a common term in golf referring to the stick carrying a flag at a golf hole, and disputes opposer's claim that "seeker" and "tracker" are synonymous, instead maintaining that the two terms are not even "overlapping in meaning."

There are specific differences between opposer's mark "PINSEEKER and design and applicant's mark PINTRACKER in typed form. Although both marks begin with "PIN" followed by a two-syllable word ending in "KER," the marks are essentially different in overall sound and appearance. However, there are similarities in these marks and we find that the similarities strongly outweigh those differences. When the marks are considered as a whole, and in relation to the golf clubs offered thereunder, PINSEEKER and design and PINTRACKER are substantially similar in overall meaning and commercial impression.

There is no dispute that the word "pin" has a recognized meaning in golf. We take judicial notice of the online dictionary reference provided by opposer in its brief which defines the word "pin" as a "staff of the flag marking a hole on a golf course."¹²

We also take judicial notice of the dictionary definitions of "tracker" and "seeker" that both parties have attached or referred to in their briefs. The entries submitted by applicant refer to "tracker" as the noun form of the verb "track," which means, inter alia, "to search for until found," and that same dictionary refers to "seeker" as the noun form of the verb "seek" having, among other meanings, "to go in search of: look for."¹³ The evidence shows that SEEKER and TRACKER convey the same general meaning. Thus, when the words SEEKER and TRACKER are each preceded by the word PIN, both marks project a substantially similar overall image in relation to golf clubs. The addition of the golf flag design to opposer's mark in this context is not a distinguishing feature as it does not change the meaning or commercial impression of PINSEEKER, it instead reinforces it.

¹² *Merriam-Webster Collegiate Dictionary*, located at www.m-w.com. The Board may properly take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

¹³ *Webster's Ninth New Collegiate Dictionary* (1988).

In view of the substantially similar meanings and commercial impressions conveyed by these marks, and because the respective marks are used in part on the identical goods, golf clubs, we believe that the differences in sound and appearance are not sufficient to avoid confusion. See, e.g., *Gastown Inc. of Delaware v. Gas City, Ltd.*, 187 USPQ 760 (TTAB 1975) (finding likelihood of confusion between GAS CITY and GASTOWN for gasoline based on similarity in meaning alone).

Contrary to opposer's contention, the incontestable status of its registrations does not constitute evidence of the strength of opposer's PINSEEKER mark. See, e.g., *Oreck Corporation v. U.S. Floor Systems, Inc.*, 803 F.2d 166, 231 USPQ 634, 638 (5th Cir. 1986). At the same time, however, there is no evidence that opposer's mark is weak and entitled to only a narrow scope of protection.¹⁴

Applicant's apparent contention that PINSEEKER is entitled to a limited scope of protection because "pin" has a recognized meaning in relation to golf is not well taken. The question of

¹⁴ As we noted earlier, the third-party registrations submitted by applicant are not properly of record. However, even if these registrations were of record, they would not be persuasive on the question of likelihood of confusion between the marks herein. Third-party registrations are not evidence of the use of the registered marks, that the purchasing public is aware of them or familiar with them, or that the marks co-exist without confusion in the marketplace. See *Conde Nast Publications Inc. v. Miss Quality Inc.*, 507 F.2d 1404, 184 USPQ 422 (CCPA 1975); and *AMF Inc. v. American Leisure Products Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973).

whether the marks are confusingly similar must be determined on the basis of the commercial impression of the marks as a whole, not the asserted suggestive or descriptive meaning of "pin" or any other single component of the marks. See H. Sichel Sohne, GmbH V. John Gross & Co., 204 USPQ 257 (TTAB 1979). Moreover, the meaning of a mark must be determined not in a vacuum, but in relation to the goods on or in connection with which it is used. See Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895 (TTAB 1988). When the mark PINSEEKER and design is considered as a whole, the mark has, at most, only an indirect or somewhat suggestive meaning in relation to golf clubs. As such, there is no reason to accord opposer's mark anything less than the normal scope of protection.

In view of the similarity of the marks, and because the goods, as well as the trade channels and purchasers for the goods are identical, we find that confusion is likely.¹⁵

Decision: The opposition is sustained and registration to applicant is refused.

A copy of this decision is being sent to all persons listed below.

¹⁵ We will not, as opposer urges, presume wrongful intent merely on the basis of applicant's admission that it had prior knowledge of opposer's marks. Mere knowledge of another's mark does not, in itself, establish bad faith or wrongful intent. See Sweats Fashions Inc. v. Pannill Knitting Co. Inc., 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987).

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